APR 5 1920
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 299

MICHIGAN CENTRAL RAILROAD COMPANY,
A CORPORATION,
Petitioner,

vs.

MARK OWEN & COMPANY, A CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Michigan Central Railroad Company, a corporation, defendant in a suit brought by respondent herein, submits this its petition for a writ of certiorari to review a decision of the Supreme Court of Illinois, and files herewith a certified copy of the entire transcript of the record in said cause, and also files herewith its brief in support of this petition.

STATEMENT OF THE MATTER INVOLVED AND REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT:

This cause originated in the Municipal Court of Chicago in a suit brought by respondent to recover from petitioner the sum of $23.30, alleged to be the value of

certain baskets of grapes which were lost out of four car load shipments made from points in Michigan over the line of petitioner to respondent in Chicago in October, 1914, September and November, 1915. The statement of claim filed by respondent in the Municipal Court alleged the making of the shipments and the loss of the grapes prior to delivery at destination. (Trans., 5.) No affidavit of merits was filed by petitioner to this statement, none being required under the rules of the Municipal Court of Chicago. All the facts appearing on the trial of the cause are contained in a written stipulation of the parties contained at pages 21 to 24 of the transcript. On pages 25 to 30 of the transcript appear the exhibits in the case, including the four bills of lading sued on. The facts, briefly, are that the shipments arrived in Chicago, were placed on public delivery team tracks of petitioner, notice thereof given to respondent, seals on the cars broken, the shipments accepted by respondent, and the unloading started before the losses complained of occurred. It is stipulated that at the time respondent accepted and started to unload the shipments each of said cars contained the same number of baskets and pounds of grapes as were received by petitioner in the car for transportation at the point of origin. The defense of petitioner in the trial court was that delivery of the shipments had been made prior to the time the losses occurred; that in any event its liability did not exceed that of a warehouseman, and that inasmuch as there was no affirmative proof of petitioner's negligence causing the loss, there could be no recovery. Judgment in the trial court was entered in favor of petitioner. (Trans. 13.) On appeal to the Appellate Court of Illinois for the First District the judgment of the Municipal Court of Chicago in favor of petitioner was reversed and judgment entered in that court in favor of respondent for $23.30. (Trans., 46.) Thereafter the Appellate Court

granted petitioner's petition for a certificate of importance and appeal to the Supreme Court of Illinois, in which court the judgment of the Appellate Court of Illinois was affirmed on December 17, 1919. (Trans., 62.) Petitioner's petition for rehearing in the Supreme Court of Illinois was denied by that court on February 5, 1920. (Trans., 63.)

The bills of lading covering the shipments involved were introduced in evidence as Plaintiff's Exhibits 1 to 4 inclusive. (Trans., 27-30.) Section 1 of each of these bills provided in part as follows:

> "For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carriers' liability shall be that of warehouseman only."

Section 5 of the bills provided in part as follows:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carriers responsibility as warehousemen only." * * *

In its opinion filed herein (Trans., 57-61), the Supreme Court of Illinois held that under these provisions of the bills of lading petitioner's liability as a common carrier of the shipments involved, extended throughout the forty-eight hour period during which the shipments were being unloaded by respondent, irrespective of the facts; that inasmuch as during this period petitioner's liability was that of a common carrier and no evidence had been produced to show how the losses occurred, petitioner was responsible.

In arriving at this conclusion the court apparently assumed that all the cars were unloaded by respondent

within 48 hours after placement and notice, whereas this is not the fact. On car 28732 respondent consumed 57 hours and 15 minutes in unloading after placement of the car and notice thereof, on car 102566, 79 hours, and on car 5586, 49 hours and 10 minutes. (Trans., 23.) In none of these cases did a Sunday or holiday intervene. There is no proof in the record as to when or how the losses occurred, so that in the case of the three cars mentioned it might well be that the losses occurred after the expiration of the 48-hour period, in which case petitioner would not be liable irrespective of the construction placed upon Sections 1 and 5 of the bills of lading.

The general reasons relied upon for the allowance of writ are:

(1) There is a federal question involved, it being the construction placed by the Illinois State Courts on Sections one and five of the interstate bills of lading covering the shipments sued upon.

(2) There is no decision by any Federal Court construing these provisions of the bill of lading. There are, however, four decisions on this point in the courts of last resort of the states of Illinois, Nebraska, Montana and Minnesota, these courts coming to different conclusions on the construction to be given the provisions in question.

(3) The question of the construction to be placed upon the provisions of the bills of lading in question is one of great importance to all common carriers of interstate freight, and should be definitely decided by this Honorable Court.

(4) The decision of the Supreme Court of Illinois does violence to the plain meaning of the provisions of the bills of lading in question, and should not be allowed to stand.

(5) In the case of three of the cars involved, the decision of the Supreme Court of Illinois imposes upon petitioner a liability as common carrier for losses which, so far as the record shows, might have occurred subsequent to the expiration of the 48-hour period mentioned in Sections 1 and 5 of the bills of lading, and during a time when petitioner, under those same provisions, was undeniably not liable as a common carrier.

WHEREFORE, petitioner prays that this, its petition for the writ of certiorari may be granted, and that this Honorable Court proceed as is provided by law and the rules of this court in such cases, and that upon final hearing the judgment of the Supreme Court of Illinois and the Appellate Court thereof be reversed.

Respectfully submitted,

Ralph M. Shaw

Counsel for Petitioner.

Frank T. Towner

Of Counsel.

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(3) The question of the construction to be placed upon the provisions of the bills of lading in question is one of great importance to all common carriers of interstate freight, and should be definitely decided by this Honorable Court.

(4) The decision of the Supreme Court of Illinois does violence to the plain meaning of the provisions of the bills of lading in question, and should not be allowed to stand.

(5) In the case of three of the cars involved, the decision of the Supreme Court of Illinois imposes upon petitioner a liability as common carrier for losses which, so far as the record shows, might have occurred subsequent to the expiration of the 48-hour period mentioned in Sections 1 and 5 of the bills of lading, and during a time when petitioner, under those same provisions, was undeniably not liable as a common carrier.

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Respectfully submitted,

Ralph M. Shaw

Counsel for Petitioner.

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Office Supreme Court, U. S.
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REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

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REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

May It Please the Court:

To answer certain contentions advanced in the brief filed on behalf of respondent we wish to submit this reply.

(a) On page 6 of respondent's brief it is said:

> "If placement and notice terminated the petitioner's liability as a common carrier, as contended by the petitioner herein, then why was it necessary for it to contract with the respondent that its liability as a common carrier should not 'extend beyond a period of forty-eight hours after placement and notice?'"

The answer to the foregoing inquiry is contained on page 18 of our main brief, where it is said:

> "The clause in question is obviously for the protection of the carrier and is designed to put a limit

> on its carrier liability which might otherwise be unreasonably extended through failure on the part of the consignee to accept or take charge of property consigned to him."

This limitation is not necessary in such states as Illinois, where placement and notice does terminate the carrier liability, but, as opposing counsel have argued, there are states where the local rule allows a consignee something more, and in such states, the clause in question does establish a maximum. It should be borne in mind, in this connection, that the bills of lading issued on these shipments were in the form agreed upon by both shippers and carriers for use in all parts of the country and which was designed to meet all conditions.

(b) On page 6 of their brief, counsel for respondent also say:

> "Not only are the provisions of the bill of lading cited herein an admission that petitioner's liability as a common carrier continued for forty-eight hours after placement and notice, but by its wording petitioner expressly stipulates that it shall so continue. No other reasonable construction seems possible."

In answer to this we submit that no one can find anywhere in Section 5 of the bills of lading, a statement that during the period of 48 hours following notice of the arrival of property, petitioner's liability shall be that of a carrier as to property not removed, and this is so no matter what construction is placed on the word "removed." The clause provides that as to property not removed within 48 hours after notice of arrival at destination the liability of the carrier shall be that of warehouseman only. It does not say that as to property not removed within 48 hours after notice of arrival at destination, the carrier's liability shall be that of a carrier for the 48-hour period. It says nothing whatsoever about what the carrier's liability shall be during the 48-hour

period. It does nothing but say that after the expiration of that period its liability shall not exceed that of a warehouseman in any event. There is no ground even for inference that during the period in question the carrier's liability should arbitrarily be declared to be that of a carrier. We cannot understand how under any rule of construction, a statement that the liability after 48 hours shall not exceed that of a warehouseman can be construed to mean that during the 48 hours the liability shall be that of a carrier.

(c) On page 6 of their brief, counsel for respondent also say:

> "If the various constructions contended for by the petitioner are intended, then it failed to insert in the contract many important modifications of a very clearly expressed liability. Certainly the respondent who did not prepare the instrument should not be held to the modifications read into these provisions by the petitioner who did prepare it."

In answer to this we say we are not contending that anything should be read into Section 5 of the bills of lading and are not contending that any modification of it should be made. What we are trying to do is to prevent an unwarranted modification of it. In our judgment, the language of Section 5 is clear and unambiguous, means only what it says, and does not require modification to be easily understandable. What we object to in this case is the reading into that provision the meaning which has been read into it by the Illinois courts.

(d) On page 7 of their brief, counsel for respondent say that in the *McIntire* case, 98 Neb. 92, the decision turned on the fact that the consignee had locked the door of the car and retained the key. With this we beg to differ. In that case and on the rehearing thereof, 98 Neb. 828, the Supreme Court of Nebraska considered

Section 5 of the bill of lading without any reference to what the facts were, and by using only its common sense and ordinary logic, arrived at the construction contended for by us. In any event, it does not seem to us that the facts in any case make any difference in the construction to be given this provision of the bills of lading. The facts in each case are important as determining whether or not a delivery of the property has been made, but it is not necessary to decide this question unless it is first decided that Section 5 of the bills of lading does not arbitrarily carry the carrier liability through the 48-hour period.

(e) In discussing the *Nash* case, 43 Ind. 423, at page 13 of their brief, counsel for respondent say,

> "by the rules of petitioner in force at the time of these shipments, it was obliged to unload at the car door."

The tariff referred to provides:

> "Carload shipments of green fruit or vegetables will be received at or delivered to the car door without additional charge for loading or unloading." (Trans. 15.)

If grapes qualify as green fruit or vegetables, the most petitioner could have required to do under this tariff was move them to the doors of the cars. If it had done so on respondent's request, petitioner's carrier liability might have been extended until the service was completed, but under the facts in this case, that contingency need not be considered.

Instead of calling upon petitioner for this service, as it claims it had the right to do, respondent waived its right and undertook the unloading itself. Having done so, respondent can not now claim any extension of petitioner's carrier liability under the tariff in question. To hold otherwise would constitute respondent the agent of

petitioner for the purpose of unloading, and that without any authorization or consent by petitioner. For the purposes of this case the tariff provision referred to can have no bearing whatever.

(f) On page 14 of their brief counsel request this court to take judicial notice of the facts surrounding public team track deliveries by carriers in Chicago. There is no evidence in the record on this point, and if the facts are to be considered, this court would have to take judicial notice of them. We submit, however, that these facts are hardly a subject for the judicial notice of this court. Representing petitioner as we do in this case, we do not know the statements made by counsel for respondent on page 14 of their brief, to be true, and it is difficult for us to understand just how counsel can expect this court to be sufficiently familiar with the facts to take judicial notice of them and in any way base its decision thereon.

(g) On page 15 of their brief counsel say:

> "Before the approval of the form of the bill of lading in the present case by the Interstate Commerce Commission, the consignee had a right recognized by the courts to a reasonable time after placement and notice in which to unload, during which the liability of the carrier continued that of a common carrier."

With modifications, this was true in some jurisdictions, but not in Illinois, as would seem to be held by the Illinois cases cited by counsel. The *Schumacher* case, 207 Ill. 199, was a demurrage case; the question involved being whether or not the carrier was entitled to recover demurrage from the consignee on shipments which had arrived at destination consigned to him and of which he had not taken delivery. The point which this case is cited as sustaining, was not in issue. There are, however, many Illinois cases directly in point; all of them

holding that upon arrival of carload freight at destination, and placement upon team track, the carrier liability, as such, terminates. In *Gratiot Street Warehouse Company* v. *St. Louis, etc. R. Co.*, 221 Ill. 418, it was specifically held that when a carrier brings freight to its destination, it terminates its liability as carrier by placing it in a safe and secure warehouse, and that in the case of car load freight, the carrier liability is terminated by warehousing in the cars on the side tracks.

To the same effect are:

Illinois Central R. Co. v. *Carter*, 165 Ill. 570.
Gregg v. *Illinois Central R. Co.*, 147 Ill. 550.
McCabe v. *A. T. & S. F. R. Co.*, 154 Ill. App. 380.
Joerg v. *A. T. & S. F. R. Co.*, 152 Ill. App. 229.
St. Louis, etc. Co. v. *C. & A. R. Co.*, 151 Ill. App. 384.

Even if the Illinois cases cited by counsel for respondent held as contended, they do not represent the great weight of authority in Illinois. So far as other states are concerned, there is fully as much authority in favor of the proposition that a carrier's liability as such terminates upon the arrival of the car at destination, placing for delivery and notice to the consignee, as there is to the contrary. Among others, opposing counsel cites cases from Alabama, Missouri, North Carolina, South Carolina and New York, but the cases cited do not at all establish the rule in these states as being opposed to our position on the question of delivery. Cases from the same states cited by us in our main brief as supporting our position are:

Barclay v. *Southern R. Co.*, 1 Ala. App. 348; 6 Ala. App. 502.
Brooks Company v. *Southern R. Co.*, 152 N. C. 665.

Kingman v. *Southern R. Co.*, 133 Mo. App. 317.
Whitney v. *R. & D. R. Co.*, 36 S. C. 365.
Anthony et al. v. *N. Y. C. & H. R. R. R. Co.*, 223 N. Y. 21.

Even in states where placement and notice does not terminate the carrier liability, the carrier's obligation, as such, is extended only for the purpose of enabling the consignee to take delivery. This does not mean for the purpose of unloading or removing goods from the car. A consignee takes delivery when he takes possession. The carrier's duty is then completed, for the duty of unloading car load freight is on a consignee. Main brief, page 31; *Hutchinson* on *Carriers*, Sec. 711; *National Lumber Dealer's Association* v. *A. C. L. R. Co.*, 14 I. C. C. 154, 160. (See also Exhibit B, Trans. 15.)

It is also true that in states where the local rule allows additional time after placement and notice in which to take delivery, such additional time is allowed only when a consignee does not appear to take delivery, or when there is some additional duty on the carrier. This is unquestionably so of dead freight, such as is involved here; although in the case of live stock, the duty to provide facilities for unloading and opportunity to use them, makes the rule different. *Erie R. Co.* v. *Shuart*, 250 U. S. 465. In this case respondent not only appeared to take delivery, but accepted the shipments and commenced to unload before any loss occurred.

As deciding the question of delivery, we refer this court to its opinion in the case of *Pere Marquette Railway Company* v. *French & Co.*, No. 105, of the October Term, 1920; the opinion of this court being dated January 17, 1921. That case involved the question of a

delivery on an order bill of lading. On page 4 of the opinion, Mr. Justice Brandeis said:

> "The Supreme Court of Michigan held that the Big Four in sending the car over the Southern to Dumesnil at the request of Bindner, made not a delivery but a technical reconsignment. Whatever name be used in referring to the act of forwarding the car, the Big Four, when it surrendered possession of the car to the Southern at Bindner's request, terminated its relation as carrier; just as it would have done if, at his request, it had shunted the car onto a private industrial track, *or had given the control of it to a truckman on the team tracks.*" (*Italics ours.*)

In this case the undisputed facts are that control of all the shipments was given to respondent's truckmen on the team tracks, so that if the statement quoted is the law as declared by this court, then in this case complete delivery had been made, regardless of the holding to the contrary by state courts.

(h) On page 18 of their brief, counsel advance the proposition that 48 hours was a reasonable time for respondent to have unloaded these shipments; that the finding of the Supreme Court of Illinois to that effect is not disputed, and that the demurrage tariff of petitioner allows that period as free time in which to perform the unloading. The demurrage tariff, of course, has nothing to do with the determination of a reasonable time in which to perform the unloading. The 48 hours there referred to is allowed as free time only for the purpose of assessing charges. In any case, we contend that what is a reasonable time in which to unload is immaterial. Our contention in this case is that in Section 5 of the bills of lading there is no language which arbitrarily continued petitioner's liability as a common carrier through the first 48 hours after placement of these cars

and notice to respondent. If we are right on this point, then we maintain, under the facts and the law, complete delivery of all the shipments had been made, or that petitioner's liability, at most, did not exceed that of a warehouseman. In this there is nothing that makes the determination of a reasonable time for unloading material. If the Federal law is to control on the question of delivery, then, under the facts in this case, delivery had been made before the losses occurred. *Pere Marquette R. Co.* v. *French & Co., supra.* If the Illinois law is to control, the same conclusion results. *Gratiot St. Warehouse Co.* v. *St. Louis, etc. R. Co., supra,* and cases cited. In either event the question of what is a reasonable time for unloading is immaterial.

(i) On page 18 of their brief, counsel say:

> "The provisions of Sections 1 and 5 of the bill of lading are perfectly plain. If there were any real or supposed hardships imposed by them on the petitioner or the other railroads, adequate conditions and limitations would have been inserted in the wording of the bill of lading, or the railroads would long ago have sought to have these provisions modified as petitioner would have them construed. The respondent did all that was required of it and removed its goods within the forty-eight hour period."

In this connection we might say that the only hardships which have been imposed on petitioner under Section 5 of the bill of lading have been imposed by the rulings of the Supreme Courts of Illinois, Montana and Minnesota. No hardships would result under the wording of the bill as it now stands, if it was read as written, and without the modifications imposed by the courts named. All that we wish is to have the provisions read as written, without modification.

In answer to the statement that respondent did every-

thing it was required to do, we will say that it did do everything it was required to do, except protect its property and prevent the theft of it. Its failure in this respect, however, should not impose any liability on petitioner.

Respectfully submitted,

RALPH M. SHAW,
Counsel for Petitioner.

FRANK H. TOWNER,
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BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

	PAGE
Argument	11
Brief of argument	6
Conclusion	34
Construction of Section 5 of bills of lading	12
Delivery of the shipments had been made	19
Liability did not exceed that of warehouseman in any event	29
Provisions of bills of lading involved	3
Specification of errors relied upon	4
Statement of the case	1
The Supreme Court of Illinois has, in effect, denied the validity of Section 5 of the bills of lading	31
Validity of bill of lading provisions	11

List of Cases Cited.

Anchor Mill Co. v. B. C. R. & N. R. Co. 102 Ia. 262	26
Anthony et al. v. N. Y. C. H. R. R. Co. 223 N. Y. 21	28
Barclay v. Southern R. Co. 6 Ala. App. 502	21
Brooks Co. v. Southern R. Co. 152 N. Car. 665	23
C. C. C. & St. L. R. Co. v. Dettlebach, 239 U. S. 588	30
Chicago, etc. R. Co. v. Kelm, 121 Minn. 343	24
Denver R. G. R. Co. v. Johnson, ... Colo. ....., 193 Pac. 729	27
Erie R. Co. v. Stuart, 250 U. S. 465	31
Gary Bros. etc. Co. v. Chicago, etc. R. Co. 49 Mont. 524	15-16
G. F. & A. Ry. Co. v. Blish Milling Co. 241 U. S. 190	11
Gratiot St. Warehouse Co. v. St. Louis, etc. R. Co. 221 Ill. 418	25-33
Gregg v. I. C. R. R. Co. 147 Ill. 550	33
G. T. & W. R. Co. v. Glinski, ... Ind. App. ...., 125 N. E. 53	15
Hutchinson on Carriers	20
I. C. R. Co. v. Carter, 165 Ill. 570	33
Kansas City So. R. Co. v. Carl, 227 U. S. 639	11
Kenney Co. v. A. & W. P. R. Co. 122 Ga. 365	21
Kingman v. Southern R. Co. 133 Mo. App. 317	24
Lewis v. N. Y. O. & W. R. Co. 210 N. Y. 21	28
Levers v. A. T. & S. F. R. Co. 22 N. Mex. 599	23
McEntire v. Chicago, etc. R. Co. 98 Neb. 92 (also at 98 Neb. 828)	14-15
Michie on Carriers	20
M. K. & T. Ry. Co. v. Ward, 244 U. S. 383	12
P. C. & St. L. R. Co. v. Nash, 43 Ind. 423	25

Prescott v. Southern R. Co. 240 U. S. 632..... 30
Rothchild v. N. P. R. Co. 68 Wash. 527..... 23
Rustad v. G. N. R. Co. 122 Minn. 453.....15-16
Southern R. Co. v. Barclay, 1 Ala. App. 348..... 20
State v. Intoxicating Liquors, 106 Me. 138..... 28
St. L. I. M. & S. R. Co. v. Starbird, 243 U. S. 592..... 12
Texas, etc. R. Co. v. Robertson, ... Tex. ..... 143 S. W. 708..... 22
T. & P. Ry. Co. v. Reiss, 183 U. S. 621..... 14
United Metals Selling Co. v. Pryor, 243 Fed. 91.....29-33
Vaughn v. N. Y. etc. R. Co. 27 R. I. 235.....19-21
Whitney Co. v. R. & D. R. Co. 38 S. Car. 365..... 25

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1920.

No. 229.

MICHIGAN CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MARK OWEN & COMPANY,
Respondent.

BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This action was brought in the Municipal Court of Chicago by Mark Owen & Company, respondent here, to recover from petitioner, Michigan Central Railroad Company, $23.30 alleged to be the value of certain baskets of grapes which were lost out of four carload shipments from points in Michigan over the line of petitioner to respondent in Chicago in October, 1914, September and November, 1915. The statement of claim filed by respondent in the Municipal Court alleged the making of the shipments and the loss of the grapes prior to delivery at destination. (Trans., 3.) No affidavit of merits or answer to this statement of claim was filed by peti-

tioner, none being required under the rules of the Municipal Court of Chicago. The case was tried on a written stipulation of the facts. (Trans., 11-15.) These facts, briefly, are that the shipments sued on arrived in Chicago, their proper destination, were placed on public delivery team tracks by petitioner, no other place of delivery being specified, notice thereof given to respondent, the seals on the cars broken, the shipments accepted by respondent, and the unloading started by it. (Trans., 12.) Up to this time there had been no loss. (Trans., 13.) On car 28732 respondent consumed 57 hours and 15 minutes in unloading, after placement of the car and notice thereof; on car 22049, 9 hours; on car 102566, 79 hours and on car 5586, 49 hours and 10 minutes. (Trans., 12.) During these periods consumed by respondent in unloading the shipments the losses complained of occurred. (Trans., 13.) There was no evidence or proof as to how the losses occurred or the cause thereof. The defense of petitioner in the trial court was that delivery of all the shipments had been made prior to the time the losses occurred; that if this were not so, its liability in any event did not exceed that of a warehouseman, and respondent could not recover in the absence of affirmative proof of petitioner's negligence causing the loss. Judgment in the trial court was in favor of petitioner. (Trans., 7.) On appeal to the Appellate Court of Illinois for the First District, this judgment in favor of petitioner was reversed and judgment entered in that court in favor of respondent for $23.30. (Trans., 23.) Thereafter the Appellate Court of Illinois for the First District granted petitioner's petition for a certificate of importance and appeal to the Supreme Court of Illinois, in which court the judgment of the Appellate Court was affirmed (291 Ill. 149) on December 17, 1919. (Trans., 32-33.) Petitioner's petition for rehearing in the Su-

preme Court of Illinois was denied on February 5, 1920. (Trans., 33.) Thereafter a petition for a writ of certiorari directed to the Supreme Court of Illinois was filed in this court on April 5, 1920. This petition was granted, the writ and return being filed on May 20, 1920. (Trans., 36.)

The bills of lading covering the shipments involved herein were introduced in evidence as Plaintiff's Exhibits 1 to 4, inclusive. (Trans., 14-15.) Section 1 of each of these bills of lading provides in part as follows:

> "For loss, damage or delay caused by fire occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

Section 5 of each of the bills of lading provides in part as follows:

> "Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier or warehouse subject to a reasonable charge for storage, and to carrier's responsibility as warehouseman only."

In its opinion filed herein (Trans., 29, 31), the Supreme Court of Illinois held that under the provisions of the bills of lading which we have cited, petitioner's liability as a common carrier of the shipments involved, extended throughout the 48-hour period during which they were being unloaded by respondent, without reference to the facts; that inasmuch as during this period petitioner's liability was that of a common carrier and no evidence had been produced to show how the losses occurred petitioner was responsible, it apparently being assumed by the court that all the shipments were unloaded within 48 hours, although this is not the fact.

SPECIFICATION OF ERRORS RELIED UPON.

I.

The Supreme Court of Illinois erred in holding and adjudging that under Section 1 and Section 5 of the bills of lading covering the shipments sued on, the liability of petitioner as a common carrier of said shipments extended throughout the period of 48 hours following placement of the cars and notice thereof to respondent.

II.

The Supreme Courtof Illinois erred in holding and adjudging that petitioner's liability during the time consumed by respondent in unloading the shipments sued on in this case was that of a common carrier.

III.

The Supreme Court of Illinois erred in holding and adjudging, in substance, that Section 5 of the bills of lading covering the slipments sued on in this case was invalid in so far as it provided that after the expiration of 48 hours after placement of the cars and notice thereof to respondent the liability of petitioner would be that of a warehouseman only.

IV.

The Supreme Court of Illinois erred in holding and adjudging that delivery of the four shipments sued on herein had not been made by petitioner prior to the losses complained of.

V.

The Supreme Court of Illinois erred in holding and adjudging that petitioner's liability with respect to the four shipments involved exceeded that of a warehouseman during the period consumed by respondent in unloading said shipments.

BRIEF OF ARGUMENT.

I.

THE PROVISIONS OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON ARE BINDING ON THE PARTIES HERETO AND THE LIABILITY OF PETITIONER IS TO BE MEASURED BY THOSE PROVISIONS SO FAR AS THEY ARE VALID UNDER THE ACT TO REGULATE COMMERCE.

All of the shipments sued on in this case moved in interstate commerce over the line of petitioner. Since the effective date of the Carmack Amendment to the 20th section of the Act to Regulate Commerce (34 Stat. at L. 593), the decisions of this court have been uniform to the effect that in so far as the provisions of a bill of lading required to be issued by the amendment are valid, they determine the rights of the parties.

Kansas City Southern R. Co. v. *Carl*, 227 U. S. 639.

G. F. & A. Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190.

St. L. I. M. & S. R. Co. v. *Starbird*, 243 U. S. 592.

M. K. & T. Ry. Co. v. *Ward*, 244 U. S. 383.

There was one amendment to the Carmack Amendment to the 20th section of the Act to Regulate Commerce, prior to some of these shipments (38 Stat. at L. 1196), but this amendment did not affect the obligation of the carrier to issue a bill of lading nor the binding effect of the provisions of such bill of lading when issued, in so far as its provisions were valid. No argument has been made in this case that the provisions of the bills of lading involved were not valid and binding on the parties; in fact, respondent has consistently

argued that they are valid and the Appellate and Supreme Courts of Illinois have so held. The dispute is as to the construction to be placed on certain of them.

II.

UNDER SECTION ONE AND SECTION FIVE OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON IN THIS CASE, THE LIABILITY OF PETITIONER AS A CARRIER WAS NOT EXTENDED THROUGHOUT THE PERIOD OF FORTY-EIGHT HOURS FOLLOWING PLACEMENT OF THE CARS AND NOTICE THEREOF TO RESPONDENT AND CONSUMED BY RESPONDENT IN UNLOADING THE SHIPMENTS.

The Supreme Court of Illinois, without considering any other question, held that under Sections one and five of the bills of lading, petitioner's liability during the first forty-eight hours following the placement of the cars and notice thereof to respondent was that of a carrier as to property which had not been taken out of the cars by respondent. This construction of the language of the provisions in question is without foundation and does violence to the language itself. Section 1 is not material, as it deals with loss resulting from fire. Section 5 is for the protection of the carrier, but this protection is withdrawn under that construction, as it will impose upon a carrier in many cases, a liability which it would not be subject to in the absence of such a provision with that meaning attached. This section has been construed in four state courts other than the Supreme Court of Illinois. Cases supporting our theory are:

McEntire v. *Chicago, etc. Ry. Co.* 98 Neb. 92; 152 N. W. 305; on rehearing, 98 Neb. 828; 154 N. W. 722.

G. T. & W. R. Co. v. *Glinski,* ..... Ind. App. .....; 125 N. E. 53.

The cases holding the opposite view are:

Gary Bros. etc. Co. v. *Chicago, etc. R. Co.* 49 Mont. 524; 143 Pac. 955.

Rustad v. *G. N. R. Co.* 122 Minn. 453; 142 N. W. 727.

III.

THERE BEING NOTHING IN THE APPLICABLE PARTS OF SECTIONS ONE AND FIVE OF THE BILLS OF LADING SUED ON EXTENDING PETITIONER'S LIABILITY AS A COMMON CARRIER THROUGH THE FIRST FORTY-EIGHT HOURS AFTER PLACEMENT OF THE CARS AND NOTICE TO RESPONDENT, DELIVERY OF THE SHIPMENTS SUED ON HAD BEEN MADE; OR, IF NOT, PETITIONER'S LIABILITY AT THE TIME THE LOSSES SUED FOR OCCURRED, DID NOT EXCEED THAT OF A WAREHOUSEMAN.

Petitioner contends that delivery of these shipments had been made prior to the losses sued for, there being nothing in the provisions of the bills of lading extending its liability as a carrier through the first forty-eight hours following placement of the cars and notice thereof to respondent. Whether this delivery had been made is ordinarily a question of fact but in this case, the facts being stipulated, it becomes a question of law.

In this case the contract of carriage had been completed. Petitioner had done with these shipments all that it contracted to do. They had been accepted by respondent, the seals broken and unloading started, at which time there was no loss. Under substantially similar circumstances, state courts have been uniform in their holdings that a delivery has been made and there is no liability with the carrier either as a carrier or as a warehouseman.

Hutchinson on Carriers (3rd Ed.), Vol. 2, Sec. 711.

Michie on Carriers, Vol. 1, Sec. 843.

Southern R. Co. v. *Barclay,* 1 Ala. App. 348; 56 So. 26.

Barclay v. *Southern R. Co.* 6 Ala. App. 502; 60 So. 479.

Kenny Co. v. *A. & W. P. R. Co.* 122 Ga. 365; 50 S. E. 132.

Vaughn v. *N. Y. etc. R. Co.* 27 R. I. 235; 61 Atl. 695.

Texas, etc. R. Co. v. *Robertson,* ..... Tex. .....; 143 S. W. 708.

Rothchild v. *N. P. R. Co.* 68 Wash. 527; 123 Pac. 1011.

Brooks Co. v. *So. R. Co.* 152 N. Car. 665; 68 S. E. 243.

Levers v. *A. T. & S. F. R. Co.* 22 N. Mex. 599; 166 Pac. 1178.

Chicago, etc. R. Co. v. *Kelm,* 121 Minn. 343; 141 N. W. 295.

Kingman v. *Southern R. Co.* 133 Mo. App. 317; 112 S. W. 721.

Gratiot Street Warehouse Co. v. *St. Louis, etc. R. Co.* 221 Ill. 418; 77 N. E. 675.

P. C. & St. L. R. Co. v. *Nash,* 43 Ind. 423.

Whitney Co. v. *R. & D. R. Co.* 38 S. Car. 365; 17 S. E. 147.

Anchor Mill Co. v. *B. C. R. & N. R. Co.* 102 Ia. 262; 71 N. W. 255.

Denver & R. G. R. Co. v. *Johnson,* ..... Colo. .....; 193 Pac. 729.

State v. *Intoxicating Liquors,* 106 Me. 138; 76 Atl. 265.

Lewis v. *N. Y. O. & W. R. Co.* 210 N. Y. 21; 104 N. E. 944.

Anthony et al. v. *N. Y. C. & H. R. R. Co.* 223 N. Y. 21; 119 N. E. 90.

If, however, under the facts of the case, complete delivery of the shipments had not been made, petitioner's liability at most did not exceed that of a warehouseman. Under this theory of the case the burden was on respondent to prove the negligence of petitioner causing the losses before there could be a recovery and this proof not being made, there could be no judgment in favor of respondent.

United Metals Selling Co. v. *Pryor et al.* 243 Fed. 91.

Prescott v. *Southern R. Co.* 240 U. S. 632.

IV.

EVEN UNDER THE CONSTRUCTION PLACED BY THE SUPREME COURT OF ILLINOIS ON SECTION FIVE OF THE BILLS OF LADING SUED ON HEREIN, THE JUDGMENT OF THAT COURT IS ERRONEOUS AS TO THREE OF THE SHIPMENTS INVOLVED.

Under the stipulated facts respondent consumed more than forty-eight hours after placement of the shipments and notice to it, in unloading three of the shipments sued on. The losses sued for occurred sometime between the time the unloading started and the time it was completed, there being no proof as to whether the losses occurred prior to the expiration of the forty-eight-hour period or subsequent thereto. It was incumbent on respondent to make its proof in order to recover. The effect of the judgment of the Supreme Court, under these circumstances, is to deny the validity of that part of Section 5 of the bills of lading which provides that after the expiration of forty-eight hours after arrival of the cars and notice thereof to respondent, petitioner's liability shall be that of a warehouseman only.

ARGUMENT.

I.

THE PROVISIONS OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON ARE BINDING ON THE PARTIES HERETO, AND THE LIABILITY OF PETITIONER IS TO BE MEASURED BY THOSE PROVISIONS SO FAR AS THEY ARE VALID UNDER THE ACT TO REGULATE COMMERCE.

The Carmack Amendment to the 20th section of the Act to Regulate Commerce (34 Stat. at L. 593) required that every carrier receiving property for interstate transportation should issue bills of lading therefor and should be liable to the lawful holder thereof for loss or damage to the shipment covered hereby. In dealing with this amendment to the act, this court has repeatedly held that the provisions of the bills of lading required to be issued are binding on the parties thereto. In *Kansas City Southern R. Co.* v. *Carl*, 227 U. S. 639, this court said, at page 648:

> "As the shipment was interstate, the contract was controlled by the 20th section of the Act of Congress of June 29, 1906. * * * The liability of any carrier in the route over which the articles were routed for loss or damage is that imposed by the Act as measured by the original contract of shipment so far as it is valid under the Act."

In the case of *G. F. & A. Ry. Co.* v. *Blish Milling Co.* 241 U. S. 190, this court said, at page 194:

> "The connecting carrier is not relieved from liability by the Carmack Amendment but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid."

The same holdings were made by this court in *St. L. I. M. & S. R. Co.* v. *Starbird*, 243 U. S. 592, at page 597, and *M. K. & T. Ry. Co.* v. *Ward*, 244 U. S. 383, at page 387.

In June, 1915, the first Cummins Amendment to the Carmack Amendment to the Act to Regulate Commerce (38 Stat. at L. 1196) became effective, but this amendment did not in any way affect the obligation of the initial carrier to issue a bill of lading nor did it in any way relieve the parties to such a bill from being bound by its provisions, except in so far as such a bill of lading attempted to relieve a carrier from full liability for loss and damage in transit by means of limitations of liability based upon reduced rates. For the purposes of this case, the first Cummins Amendment referred to did not in any way alter the law as declared by this court in the cases we have cited. No question is raised as to the validity and binding effect of the provisions of the bills of lading in this case; in fact, the judgment of the Supreme Court of Illinois is based upon an implied holding that they are valid and binding on the parties.

II.

UNDER SECTION ONE AND SECTION FIVE OF THE BILLS OF LADING COVERING THE SHIPMENTS SUED ON IN THIS CASE, THE LIABILITY OF PETITIONER AS A CARRIER WAS NOT EXTENDED THROUGHOUT THE PERIOD OF FORTY-EIGHT HOURS FOLLOWING PLACEMENT OF THE CARS AND NOTICE THEREOF TO RESPONDENT AND CONSUMED BY RESPONDENT IN UNLOADING THE SHIPMENTS.

The decision of the Supreme Court of Illinois in this case is based entirely on the construction placed by it on Sections 1 and 5 of the bills of lading covering the ship-

ments sued on. Section 1 of each bill of lading provides in part as follows:

> "For loss, damage or delay caused by fire occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export), has been duly sent or given, the carrier's liability shall be that of warehouseman only."

Section 5 of each of the bills of lading provides, in part, as follows:

> "Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot or place of delivery of the carrier or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage."

The Supreme Court of Illinois held that under that part of Section 5 as quoted, the liability of petitioner as a carrier extended throughout the 48-hour period following placement of the cars and notice thereof to respondent, as to property not removed and that inasmuch as a portion of each shipment was lost sometime between the time the unloading started and the time it was finished, petitioner was liable. The part of Section 1 of the bill of lading which we have referred to, and which was cited by the Supreme Court of Illinois, is not material in this case as it deals only with loss resulting from fire. We contend that the construction placed by the Supreme Court of Illinois upon the applicable part of Section 5 of the bills does violence to the language used and imposes upon petitioner under the cir-

cumstances of this case, a liability which is without foundation, either in the law or in the language of the bills of lading.

To begin with, we contend the Supreme Court of Illinois fell into error in applying the rule of construction approved in *T. & P. Ry. Co.* v. *Reiss,* 183 U. S. 621. That case was decided on January 13, 1901, and involved the construction to be given a bill of lading issued by the initial carrier of the shipment sued on. The bills of lading involved in this case are in the form approved by the Interstate Commerce Commission in *"In the Matter of Bills of Lading,"* 14 I. C. C. Rep. 346, decided June 27, 1908, in which case the Commission said:

> "The bill as submitted represents in most, if not all, of its principal features, a virtual agreement between shippers and carriers."

We submit that in arriving at the correct construction of the clause in question, respondent should not be handicapped because the bills of lading were issued by it. So far as we have been able to find, there are four decisions on this language of the bill of lading in various state courts, aside from the decision of the Supreme Court of Illinois in this case.

In *McEntire* v. *Chicago, etc. Ry. Co.* 98 Nebraska, 92, 152 N. W. 305, the facts were that the carload of furniture involved was destroyed by fire on the defendant's sidetrack where it had been placed by defendant, after notification to the plaintiff and after a portion of the goods had been unloaded by plaintiff. The only distinction between the facts in that case and the facts in this case is that in that case, the plaintiff, after unloading a portion of the furniture placed his own lock on the car. In construing Section 5 of the bill of lading which was identical with the same section in the bills of lading involved in this case, that court said:

"Plaintiff insists that under the shipping con-

tract set out, an absolute liability rests on the carrier for 48 hours after notice of the arrival of the car or until the consignee has taken actual physical possession of the property by removing it from the car and that after the 48-hour period, the liability of warehouseman exists. But we do not believe the contract susceptible of this construction. A more reasonable construction seems to be that property not removed by the consignee within 48 hours after notice of its arrival may be left in the car subject to a reasonable charge for storage and that the liability of the carrier shall be that of warehouseman only. * * *

The property was so bulky that it did not reasonably admit of an actual physical transfer but the carrier, by giving permission to unload, surrendered its control and dominion. There was nothing further for it to do and the consignee, by breaking the seal and locking the door with its own lock and retaining the key, assumed control and dominion and the transfer and delivery was complete."

The rehearing of the same case is reported at 98 Neb. 828, 154 N. W. 722, the court adhering to its original decision, after a consideration of the cases of *Gary Bros. etc. Co.* v. *Chicago, etc. R. Co.* 48 Mont. 524, 143 Pac. 955, and *Rustad* v. *G. N. R. Co.* 122 Minn. 453, 142 N. W. 727, cited by the Supreme Court of Illinois in support of its conclusion.

In *G. T. & W. R. Co.* v. *Glinski,* ..... Ind. App. ....., 125 N. E. 53, the shipment arrived at destination, the consignee was notified and unloaded a portion of the goods, thereafter closing the door of the car and informing the carrier's agent that he was leaving the property in his care. Two days later when the plaintiff went to unload the balance of his property he found part of it missing. Section 5 of the contract of shipment in that case was in the same words as Section 5 of the contract in the case at bar. In passing on that case the court said:

"If the goods were delivered to appellee, appel-

> lant's liability was at an end. If there was no delivery of the goods left in the car, then appellant's liability had not ended. Instruction No. 8 informed the jury that as a matter of law appellant was in duty bound to care for and guard such goods for a pèriod of 48 hours after their arrival without any reference to whether the goods had been delivered or not. This instruction would have been correct if it had been limited to the theory that there had not been a delivery of the goods, but in the form given, it was error for which judgment must be reversed."

In the Gary and Rustad cases, *supra,* the courts held the contrary with respect to the provision in question. In the Gary case the potatoes involved were frozen within 48 hours after placement of the car and notice to the consignee, but after the consignee had inspected them, accepted and taken charge of them. The court held that there being no removal of the property from the car before it was damaged and the carrier, having undertaken to answer for its safety as a carrier for 48 hours or until it was removed, was liable. In the Rustad case substantially the same conclusion was reached in so far as the construction of the bill of lading was concerned, although in that case the loss sued for occurred after the 48-hour period had expired, and it was not necessary for the court to pass upon the clause in question in order to decide the case.

We submit that the construction placed upon the provision of the bills of lading involved in the McEntire and Glinski cases, *supra,* is correct. The judgment of the Supreme Court of Illinois is founded primarily upon the fact that some of the property was in the cars at the time the losses complained of occurred, the theory apparently being that there must have been an actual physical taking of the property by the consignee before petitioner's liability as a carrier terminated. The court did not consider the possibility of there being a con-

structive removal of the property in so far as the liability of petitioner was concerned, separate from the actual physical taking thereof by respondent. Yet we submit that there could be such a removal and that there was such a removal in this case.

Under the construction approved by the Supreme Court of Illinois a carrier would be liable as such for loss or damage to a carload shipment on a private track of a consignee on his property and under his exclusive control, if the property had not been taken out of the car and the damage occurred before the expiration of 48 hours after the setting of the car on the track and notice to the consignee; for in such a case there would have been no physical removal of the property. Yet in such a case, the holding of a carrier to its carrier liability or indeed, to any liability, would be ridiculous. Under the same construction, we presume a carrier would be liable as such for damage to property actually taken out of a car by the consignee's agents, on the carrier's public delivery track, on the theory that the shipment had not been physically removed off the carrier's land. Such a proposition would be equally ridiculous, and yet we submit, that if it is not correct, the judgment in the case at bar is wrong. In each of the instances we have cited there would be a liability under the construction placed upon the word "removed" by the Supreme Court of Illinois; in the first case because there had been no removal from the car, which is the carrier's property, and in the second case, because there had been no removal off the carrier's land. Under the same theory, we suppose petitioner would be liable as carrier in this case if the losses had occurred after the grapes were on respondent's wagons but still on petitioner's land. The effect of this construction is to make respondent's agents the agents of petitioner; and that without any choice

on the part of petitioner. We submit that property is removed under Section 5 of the bills of lading when a carrier has discharged its duty with reference thereto and the consignee thereof has assumed control and dominion over it.

We ask the court to consider the effect of the holding made by the Supreme Court of Illinois under the circumstances of the case at bar. The cars involved had been placed on petitioner's public delivery team track, there being no other place of delivery specified in the contract; respondent had been notified of such placement, had broken the seals on the cars, and accepted the shipments and had commenced the unloading before the losses complained of occurred. Petitioner had complied with its contract of shipment and had done all that it was obligated to do; it had given up all dominion over the property and this dominion had been assumed by respondent. It is true that all the property had not been physically removed from the car before the losses complained of occurred but there was in effect a removal of the property so far as the liability of petitioner was concerned, for there was nothing left for it to do. Notwithstanding the fact that all of the property in these cars was not removed at the same time, it is still nevertheless true that under the stipulated facts it was under the sole jurisdiction and control of respondent; and even respondent has been unable to suggest any additional duty on petitioner under the circumstances of this case. The clause in question is obviously for the protection of the carrier and is designed to put a limit on its carrier liability which might otherwise be unreasonably extended through failure on the part of the consignee to accept or take charge of property consigned to him. The effect of the decision of the Supreme Court of Illinois is to impose a carrier lia-

bility upon petitioner through the 48-hour period, merely by reason of the accident of respondent being unable to complete the unloading without leaving a portion of the property in the car and on petitioner's land for a space of time. This, we submit, is manifestly incorrect in law and unjust on principle. As the Supreme Court of Rhode Island said in *Vaughn* v. *N. Y. etc. R. Co.* 27 R. I. 235, 61 Atl. 695:

> "The fact that it (the shipment) remained in the defendants' cars was a mere matter of convenience for the plaintiff but did not impose any liability on the defendant."

III.

THERE BEING NOTHING IN THE APPLICABLE PARTS OF SECTIONS ONE AND FIVE OF THE BILLS OF LADING SUED ON EXTENDING PETITIONER'S LIABILITY AS A COMMON CARRIER THROUGH THE FIRST FORTY-EIGHT HOURS AFTER PLACEMENT OF THE CARS AND NOTICE TO RESPONDENT, DELIVERY OF THE SHIPMENTS SUED ON HAD BEEN MADE; OR, IF NOT, PETITIONER'S LIABILITY AT THE TIME THE LOSSES SUED FOR OCCURRED, DID NOT EXCEED THAT OF A WAREHOUSEMAN.

On this point we submit that under the facts of this case delivery of all these shipments had been completed before the losses sued for occurred. As we have heretofore argued, petitioner's contract had been completed and there was nothing left for it to do. Respondent had assumed complete dominion over the property shipped, having accepted it. This, we submit, constituted a complete delivery of the shipments, terminating petitioner's liability. Under substantially similar facts the textbooks and the courts of the various states are practically a unit in holding delivery has been completed.

In Hutchinson on Carriers (3rd Edition), Volume 2, Section 711, it is said:

> "All, therefore, that can be required of the railroad company is that it shall place the cars where they may be safely and conveniently unloaded; or place them at the designated place, if a certain place has been named in the contract of shipment, and if notice is required by some rule of law a binding usage, or the contract, notify the party entitled to the freight of its action."

In Michie on Carriers, Volume 1, Section 843, it is said:

> "But the carrier's liability is terminated where the consignee has actually accepted the goods, as where they are pointed out to him and he removes a portion, or has paid the freight or the carrier retains the goods at his request."

In *Southern R. Co.* v. *Barclay*, 1 Ala. App. 348, 56 So. 26, delivery of the car containing the property in question had been made on carrier's sidetrack. In the afternoon of that day the plaintiff partially unloaded the car. That evening the property remaining in the car was damaged by rain. The only difference in the facts in this case and in the case at bar is that in the Barclay case the consignee placed a lock on the car after partially unloading it. The court says:

> "The consignee cannot take charge of the goods as completely delivered and continue to hold the carrier to a liability, either as a carrier or as a warehouseman. This is what the consignee in the case at bar is undertaking to do. When the car containing his goods was left on the siding at the point of destination, he assumed complete control of it and of its contents. * * * What he did amounted to an acceptance by him of the leaving of the car on the siding as a complete delivery. The consignee was entitled to but one delivery by the carrier. By assuming control of his goods he released the railway company from any further responsibility whether as a carrier or as a warehouseman."

In *Barclay* v. *Southern R. Co.* 6 Ala. App. 502, 60 So. 479, which was a second appeal of the same case, the court said:

> "The defendant cannot be held liable to respond in damages under its contract of shipment, either as a warehouseman or as a common carrier, for injuries or damage received to the goods from whatever cause resulting after completion by the defendant of its contract by carrying the goods to the point of destination and there delivering them to a consignee who accepts the shipment and assumes sole custody of the goods before the damage is suffered."

In *Kenny Company* v. *A. & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132, the car in question had been placed by the carrier on its delivery track and the consignee notified. On the next day the consignee unloaded a portion of the shipment, and after doing so, the carrier sealed the car up. On the following morning it developed that there had been a loss during the previous night. Under these facts the court held that there had been a delivery prior to the loss, saying:

> "The railroad company was bound to safely deliver this sugar to the consignee and this it did. The agent of the consignee, after verifying the number of barrels and bags in the car, signed a receipt in full which he delivered to the railroad company. This, in our opinion, constituted a complete delivery of the goods by the railroad to the consignee, Kenny Company. The goods were in a car at a place where the consignee could get them and while it is true that it did not remove all of the sugar on the same day, the record fails to disclose that the defendant company did anything to prevent its delivery."

In *Vaughn* v. *N. Y. etc. R. Co.* 27 R. I. 235, 61 Atl. 695, the cars containing the property in question had been placed on the defendant's spur track at destination and the plaintiff notified. The cars were then opened by plaintiff and part of the contents removed by him. That

night the plaintiff put his locks on the cars and early the following morning they were destroyed by fire. The court said:

> "The testimony is not clear as to how much of the bran and gluten was removed but we think it sufficiently appears that a sufficient delivery of these two carloads was made to the plaintiff and that he exercised and retained dominion as owner over the contents so that he could not thereafter claim that he had not received them and that they were not his property. * * * The property had been delivered on the spur track of the plaintiff, he had accepted it, sold and removed some of it, and had assumed full dominion over it; and the mere fact that it remained in the defendant's cars was a mere matter of convenience for the plaintiff, but did not impose any liability on the defendant."

In *Texas, etc. R. Co.* v. *Robertson,* ..... Tex. ....., 143 S. W. 708, the car containing the property had arrived at destination, had been set in the usual and customary place for unloading and the consignee had taken some of the goods out of the car and thereafter sealed it up on his own account. Thereafter it was destroyed by fire of unknown origin. In deciding the case, the court said:

> "The railroad company transported the car of merchandise from Dallas to Grand Saline and placed the same on the unloading track for the plaintiff. Plaintiff surrendered the bill of lading to the carrier and received and hauled away some of the merchandise. At the special request of the shipper, some of the merchandise was permitted to remain in the car, for which privilege he agreed to pay demurrage. The railroad having fully performed its duty of transporting the merchandise could not be held liable as carrier. There was no negligence shown on the part of the railroad company in permitting the merchandise to remain in the car while it was standing on the track, without which the company could not be held liable as warehouseman. The evidence showing that the contract of carriage had been fully per-

formed, the court should have entered judgment for defendant."

In *Rothchild* v. *N. P. R. Co.* 68 Wash. 527, 123 Pac. 1011, the car containing the property had reached destination, had been spotted on the team track for delivery, the bill of lading surrendered and the consignee notified. On the following day the consignee's teamster went to the car to unload it at which time it burst into flame and the property was entirely consumed. The court held that there had been a delivery of the property, saying:

> "Not only had the bill of lading been surrendered and the car been spotted on the defendant's delivery tracks for delivery before the fire occurred, but the plaintiff's agents had actually reached the car with teams, had broken the seal of the car and had opened and entered it for the purpose of removing the property. This clearly constitutes a delivery. There was not only a surrender of the right of possession of the property by the defendant, but there was an actual surrender of the property itself by the defendant and an actual taking of the property by the plaintiff. Delivery could have been no more complete had the wagons been actually loaded and started on their way to the plaintiff's warehouse."

In *Brooks Co.* v. *Southern R. Co.* 152 N. C. 665, 68 S. E. 243, the action was to recover for delay in shipment, the question being when the property had been delivered. The court said:

> "Transportation ceases when the duty of the carrier as a warehouseman commences, and in respect to freight transported in carload lots, when the car reaches destination and is placed for unloading."

In *Levers* v. *A. T. & S. F. Ry. Co.* 22 N. M. 599, 166 Pac. 1178, the court said:

> "A delivery of property transported by a common carrier to the consignee is not made and does not become effectual until the consignee is placed either in actual or constructive possession of the property. Property transported in carload lots may

be delivered by the placing of the car in which such property is loaded upon a siding or other convenient place for unloading, at its destination, and the surrender by the railroad company of its dominion over the same, to the consignee."

In *Chicago, etc. R. Co.* v. *Kelm*, 121 Minn. 343, 141 N. W. 295, the cars containing the property had been placed for delivery on the consignee's orders and the unloading was started on the following day. On the afternoon of the same day one of the cars caught fire and was damaged. The court held that there had been a delivery, saying:

"Where a carrier transports bulky freight, in carload lots, to its destination, and, to enable the consignee to unload it conveniently, places the cars upon a track designated by the consignee for that purpose, or, if he has made no such designation, upon a track proper for that purpose, and he has notice thereof, it is held by several courts that the carrier has performed the last act required by its duty to the consignee, that the delivery is complete, and that the carrier's liability as carrier has terminated. * * * As defendant's four carloads of hay had been placed at the point designated by him, for his convenience in unloading them, and the possession of the hay had been turned over to and taken by him for the purpose of removing it, and he had actually begun such removal, so that the final act required of the plaintiff in the performance of its duty had been completed before the fire, plaintiff's absolute liability as carrier had terminated, and it was liable for the subsequent damage to the property only in case such damage resulted from its negligence."

In *Kingman* v. *Southern R. Co.* 133 Mo. App. 317, 112 S. W. 721, the cars containing the property had been placed on a switch track where they were subsequently damaged by floods. The court said:

"Plaintiff's evidence tends to show that it had the right to inspect the cars after they were placed on the switch before accepting them. This right

> does not militate against defendant's contention that a delivery on the switch was a sufficient delivery to release it from liability as a common carrier as to said cars, for a delivery subject to the right of inspection placed them under the dominion of plaintiff, and defendant had no right to interfere with that dominion, unless on inspection, plaintiff rejected the cars and notified defendant of its rejection. * * * The evidence shows that the goods were in the possession of the plaintiff; hence plaintiff failed to make out its case and the demurrer to the evidence was properly sustained."

In *Gratiot St. Warehouse Company* v. *St. Louis, etc. R. Co.* 221 Ill. 418, 77 N. E. 675, the court said:

> "When the carrier has brought the goods or the freight to their destination, it has a right to place them in a safe and secure warehouse, and its liability then changes from that of a common carrier to that of a warehouseman. * * * When the carrier has no depot or warehouse at the place of destination for the storage of such freight as corn, it may be warehoused in the cars on the sidetracks."

In *P. C. & St. L. R. Co.* v. *Nash,* 43 Ind. 423, the car containing the property had arrived at destination, but had not been placed on the usual track for delivery. The following night it was burned, the cause of the fire being unknown. The court therefore held that the contract of carriage had not been completed but said:

> "Where the articles shipped are such as cannot be safely deposited in a warehouse, and where the carrier is not required by contract or usage to unload the car, the delivery will be regarded as complete when the car is placed at the usual place of delivery or at some safe and convenient place designated by the consignee, and such consignee has received notice of such arrival and delivery. In such case the car so placed would be the equivalent of the warehouse and the liability of a warehouseman would attach."

In *Whitney Company* v. *R. & D. R. Co.* 38 S. C. 365,

17 S. E. 147, the car containing the property had been placed for delivery and was in the course of being unloaded by the consignee at the time it was destroyed by fire. In holding that delivery had been made, the court said, referring to the carrier:

> "It had transported the goods from the point of shipment to the place of delivery in perfect condition. The waybill had been delivered up as a receipt to the railroad company therefor. Not only were the goods receipted for but actually received. * * * There was absolutely no testimony that the defendant had in any manner interfered with this property after such delivery; and in the absence of all testimony to this effect, there was no issuable fact for the jury to try."

In *Anchor Mill Company* v. *B. C. R. & N. R. Co.* 102 Ia. 262, 71 N. W. 255, the cars containing the property had arrived at destination and had been placed on a delivery sidetrack. On the next morning the plaintiff was notified. On the following day the consignee took part of the property out of the car. In holding that there had been a delivery, the court said:

> "The railroad company, in order to deliver this wheat in bulk, certainly could not be expected to unload it. All that could be required was that it place the car where it could be safely and conveniently unloaded by the party entitled to it, and notify him of its action. When it had done this, its duties as a common carrier ended. In this case the car was put at the very place plaintiff had requested, for the purpose of being unloaded, and the plaintiff duly notified of its action. What more could the railway company do to complete the delivery? It had delivered the car, in so far as it was capable of delivery, to the party entitled thereto, as directed by the consignee, within a reasonable time at the very place agreed upon, and in the only manner practicable. Nothing more could have been done."

Denver & R. G. R. Co. v. *Johnson,* ..... Colo....., 193 Pac. 729 (Advance Sheets of January 10, 1921), was an action for damages for the destruction by fire of certain hardware in a freight car. It was admitted that the railroad was guilty of no negligence, but plaintiff sought recovery on the ground that defendant was liable as a common carrier. The car had arrived and been spotted at a convenient place for unloading after 6:00 P. M., July 2nd. At 9:00 A. M., July 3rd, consignee was notified, broke the seal of the car and unloaded one wagonload therefrom. During the afternoon of July 3rd, consignee closed and locked the car. At 2:00 P. M., July 4th, the car and contents were destroyed by fire. The court said:

> "The plaintiffs rely upon the rule that the extraordinary liability of the carrier continues until the consignee has had a reasonable time in which to remove the goods. This ruling, however, is usually applied in cases where the shipment, on its arrival at destination, is awaiting delivery to the consignee. In 10 C. J. 235, the rule is discussed under the heading: 'Custody Awaiting Delivery to Consignee.' In *D. & R. G.* v. *Peterson,* 30 Colo. 77, 69 Pac. 578, cited by plaintiff, the goods were awaiting delivery at the time of the destruction by fire. * * *
>
> As to the hardware in the car, the plaintiffs assumed control of same. They had broken the seal and entered the car before the fire occurred. This shows final delivery. 1 Moore on Carriers, p. 200. After completion of the contract of carriage and complete delivery to and acceptance by the consignee, the common carrier is not liable, as such, for loss or injury to the shipment thereafter occurring. 10 C. J. 274, Sec. 350; 4 R. C. L. 759, Sec. 226. A headnote in the Pac. Rep. to the opinion of the court in *Lynch* v. *Union Pac. R. Co.* 65 Colo. 152, 172 Pac. 1062, reads as follows: 'Where railway delivers a carload of vegetables to consignee, who accepts same and starts removing vegetables from the car, the railway's responsibility for the safety of the vege-

> tables ceases; and, where vegetables remaining in car freeze, the railway is not liable for damages sustained.' Upon the principles announced or applied in the authorities above cited, the defendant in the instant case is not liable, and it was error to render judgment for plaintiffs."

In *State* v. *Intoxicating Liquors,* 106 Me. 138, 76 Atl. 265, the action was to seize certain liquor. It had arrived at destination, the bill of lading had been surrendered, a receipt given for the whole shipment and all but 10 cases taken away. Under these facts the court held:

> "Not finding any decision of that court to the contrary upon facts like those in this case, we think, for the reasons above given we should hold that the transit was ended, that the liquors had come into the possession of the consignee at the time of the seizure and were then subject to seizure and forfeiture under the state law."

In *Lewis* v. *N. Y. O. & W. R. Co.* 210 N. Y. 21, 104 N. E. 944, the plaintiff had been injured while unloading a carload of hay on defendant's sidetrack and had sued the carrier. In passing on the case the court said:

> "If the consignee undertakes to unload the car, which is switched for convenience on a sidetrack in his yard, the carrier's function ends, and delivery is complete when the car is thus placed in the custody of the consignee."

In *Anthony et al.* v. *N. Y. C. & H. R. R. Co.* 223 N. Y. 21, 119 N. E. 90, the court thus stated the principle of delivery of carload freight:

> "The placing of the car upon the public team track, in order that the plaintiff should unload it, concurred in and acted upon by the plaintiff, was a completed delivery, and terminated the undertaking and obligation of the defendant as a common carrier."

The facts in the case at bar more completely support the argument that delivery of the shipments sued on had been made before the losses complained of occurred than

do the facts in most of the cases we have cited. It is true that all the property had not been unloaded from these cars prior to the time the losses occurred but this should make no difference. If the respondent, to suit its own convenience or for any other reason, allowed any part of this property to remain in the car after it had assumed sole control and jurisdiction over such property by accepting it, and during this time a loss occurred, there is certainly no justice or equity in requiring petitioner to answer therefor. We submit that under the law and in justice to petitioner, it should be held that delivery of these shipments had been made and that the losses in this case should fall on the party responsible which was the respondent.

The most that can be said from respondent's viewpoint, under the facts in this case is that the liability of petitioner was that of a warehouseman, but even were this the status of petitioner at the time of the losses, there is still no right of recovery in respondent. The manner or cause of these losses is unknown. The only thing that is clear is that they occurred sometime between the time the unloading was started and the time it was completed. If petitioner were even liable as warehouseman, the burden was on respondent to prove its negligence before there could be a recovery.

In *United Metals Selling Co.* v. *Pryor*, 243 Fed. 91, the action was to recover from the carrier for certain property lost while it was holding it as a warehouseman. The Circuit Court of Appeals, referring to the allegations of the petition, said at page 98:

> "But that is not sufficient to enable the appellant to recover in the absence of proof by it of the negligence it charges against the railroad company whereby the copper was lost from the car. The appellant, however, maintains in argument that, hav-

> ing shown the loss of the copper from the car (or other grounds from which it might be inferred that it was stolen from the car); a *prima facie* case of negligence is shown against the defendant and that the burden then shifts to it to show its freedom from negligence, and cases from certain of the state courts including Missouri are cited in support of this contention. But an equal or greater number of decisions from the courts of other states may be cited to the contrary. * * * There is no evidence that the car or the seal upon the west door thereof were insufficient in any respect; and the inference that the seal was broken and the copper stolen from the car was not sufficient to warrant a finding that the copper was lost because of any neglect or want of ordinary care upon the part of the railroad company as warehouseman."

On this point we also refer the court to the case of *Southern Railway Company* v. *Prescott,* 240 U. S. 632.

In making our argument under this point, we do not lose sight of the fact that this court has passed on cases, which are in some ways related to this one. These cases, however, are not decisive of this issue. In *C. C. C. & St. L. R. Co.* v. *Dettlebach,* 239 U. S. 588, it was not disputed that the carrier was liable as a warehouseman and on page 591 of the decision is the statement of fact that the goods were not called for by the consignee and remained in defendant's possession as warehouseman. In the case at bar, the goods were not in petitioner's possession after their acceptance by respondent and the starting of the unloading.

In *Southern Railway Co.* v. *Prescott,* 240 U. S. 632, the situation was substantially the same as in the Dettlebach case, *supra.* There was no denial of the fact that the liability of the carrier was that of a warehouseman, and on page 636 it is stated that there is no dispute as to the fact that the nine boxes had remained in the possession of the carrier. These facts distinguish the case

from the one at bar. Both the Dettlebach and Prescott cases, *supra,* support our theory of this case that in no event did the liability of petitioner at the time the losses occurred exceed that of a warehouseman, which would impose upon respondent the burden of proving the negligence of petitioner as the cause of the losses. In the case of *Erie R. R. Co.* v. *Shuart,* 250 U. S. 465, the fact was that the unloading had not been started. The horses were still in the car and only half an hour had elapsed between the time the consignee took charge of them and the time the accident occurred. The majority opinion says:

> "The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal."

This illustrates the distinction between the liability of a carrier as such, in the case of live stock and in the case of dead freight in carloads, as in the case at bar. In the case of dead freight in carloads, there is no obligation on a carrier to furnish facilities for unloading nor opportunity to use them, the duty being on a consignee to perform this service without assistance from the carrier. All the cases we have cited so hold, and there are practically no decisions to the contrary.

IV.

EVEN UNDER THE CONSTRUCTION PLACED BY THE SUPREME COURT OF ILLINOIS ON SECTION FIVE OF THE BILLS OF LADING SUED ON HEREIN, THE JUDGMENT OF THAT COURT IS ERRONEOUS AS TO THREE OF THE SHIPMENTS INVOLVED.

The contention of respondent throughout the course of this litigation has been that the bill of lading contracts were valid; that that portion of Section 5 which

provides that after the expiration of 48 hours the liability of the carrier shall be that of warehouseman only as to property not removed, was binding on the parties, and that under this provision petitioner's liability as carrier extended throughout the 48-hour period. The Supreme Court of Illinois sustained this proposition, apparently assuming that each car was unloaded within the 48-hour period. This, however, is not the fact. In the case of three of the cars, respondent consumed more than 48 hours following the placement of the cars and notice thereof to it, in completing the unloading. (Trans., 12.)

In its decision herein, the Supreme Court of Illinois upheld the validity of Section 5 of the bills of lading, and based its conclusions on what we claim is an erroneous construction thereof. In the same decision, however, it impliedly holds the clause not to be good, by holding petitioner to its carrier liability in the case of three of the cars for periods in excess of 48 hours after arrival and notice. There is nothing in the record in this case to indicate when or how the losses occurred. There is nothing in the record to indicate that the losses in the case of the three cars referred to did not occur subsequent to the expiration of the 48-hour period. If this were the fact, then under the very construction placed upon the provision by the Supreme Court of Illinois and on the authority of that court's holding as to the validity of the clause, the judgment herein cannot be sustained.

The burden was on respondent to prove its case. In the statement of claim filed in the Municipal Court of Chicago, which was the only pleading in the case, petitioner is alleged to be liable as a common carrier, but there was no proof that it was liable as such at the time the losses occurred.

If, as a matter of fact, the losses in the case of the three cars, occurred after the expiration of the 48-hour period, and if Section 5 of the bills of lading is valid, as held by the Supreme Court of Illinois, then the burden of proving petitioner's negligence was on respondent. *United Metals Selling Co.* v. *Pryor et al., supra.* If, on the other hand, respondent contends that petitioner was liable as a carrier, as alleged in the statement of claim, then the burden was on it to prove that the loss occurred within the 48-hour period, even under the construction placed by the Supreme Court of Illinois on Section 5 of the bills of lading. In neither case has the necessary proof been made. Assuming, for the argument, that Section 5 of the bills of lading is invalid, then respondent, in the case of all the cars, is remitted to his rights under the Illinois law as declared by the Illinois courts, which have held uniformly that under such circumstances as obtained in this case, a carrier's liability does not exceed that of warehouseman. *Gratiot Street Warehouse Co.* v. *St. Louis, etc. R. Co.* 221 Ill. 418; *I. C. R. Co.* v. *Carter,* 165 Ill. 570; *Gregg* v. *I. C. R. Co.* 147 Ill. 550. We, of course, maintain that Section 5 of the bills of lading is valid, but no matter what conclusion is reached on this point, the judgment in the case at bar cannot stand. And in any event, the opinion of the Supreme Court of Illinois is erroneous, for it denies the validity of Section 5 in order to affirm the judgment, after sustaining its validity for the purpose of construing the language used.

Conclusion.

The amount involved in this case is insignificant, but the principle on which the judgment of the state courts is based is of vital importance, and on its final determination will depend the liability in a great number of similar claims. Also, if the decision of the Supreme Court of Illinois is to stand, the practice now followed by petitioner on its various team tracks will have to be entirely changed and the same will also be true of other carriers under like circumstances. Not only will a common carrier be called upon to perform the duty it contracts to perform, but it will also be called upon to perform an additional duty, if the inability of a consignee to unload makes the performance of such a duty necessary. It will also not only be called upon to insure the honesty of its own employees over which it has, theoretically at least, some jurisdiction, but will also be called upon to insure the honesty of employees of consignees over which employees it has no jurisdiction whatsoever. We do not believe the law and the language of that provision of the bills of lading now in question, can be so twisted as to bring about this result. The burden of a common carrier is indeed great, but there is certainly a limit to it somewhere and we submit that that limit has been reached, when, as in this case, a consignee, by its own action, entirely relieves a carrier from any obligation to perform any duty whatsoever with reference to a shipment. We cannot understand the justice of the position of the respondent here in first assuming sole control over this property and thereafter requiring petitioner to make good losses which may have occurred as a result of the inefficiency or dishonesty of its own employees.

Aside from this point, however, the judgment of the Supreme Court of Illinois cannot stand in any event, for the reasons given under Point IV herein. We submit that the judgment of that court should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

FRANK H. TOWNER,
Of Counsel.

MAR 5 1921
JAMES D. MAHER,

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1920.

NO. 299

MICHIGAN CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

MARK OWEN & COMPANY,
Respondent.

BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT.

WILLIAM B. MOULTON,
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STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This case has been heard by three courts. In this Court for the first time the petitioner points out that the unloading of three of the four cars involved was not completed within forty-eight hours after notice of arrival. In each hearing it was assumed by Court and counsel that every car had been unloaded within the forty-eight hour period. The trial court held in a proposition of

law that all the cars were unloaded within a reasonable time, and that holding was not questioned by the petitioner. (Trans., 16.) The Appellate Court of Illinois found that every car was unloaded within the forty-eight hour period and this finding remained unchallenged by the petitioner in the Supreme Court of Illinois. The contention of the respondent herein is that under Sections 1 and 5 of the Bills of Lading covering these shipments the liability of the petitioner continued that of a common carrier as to goods not removed within forty-eight hours after placement and notice of arrival. No such contention is made as to goods not removed after the forty-eight hour period. In order to simplify the issue, the respondent waives any claim to the losses on cars Nos. 28732, 102566 and 5586, respectively, and confines its claim to car No. 22049. Car No. 22049 was unloaded within nine hours after placement and notice of arrival. (Trans., 12.) The loss on this car amounted to 31 baskets of grapes the value of which was $8.68. (Trans., 11-13.) As to this sum the respondent asks that the judgment of the Supreme Court of Illinois be affirmed.

BRIEF.

I.

Under Sections one and five of the Bill of Lading covering the shipment in car No. 22049 the liability of the petitioner continued for a forty-eight hour period after placement and notice thereof to the respondent.

The Bill of Lading having been prepared by the petitioner, Sections 1 and 5 should be construed most strongly against it.

Texas & Pacific Ry. Co. v. *Reiss*, 183 U. S. 621.
Lehigh Valley Transportation Co. v. *Post Sugar Co.*, 128 Ill. App. 600.
10 Corpus Juris 181.

The contention of the petitioner as to delivery in this case is without value, in view of the words used in Section 5 of the Bill of Lading.

Gary Bros. etc. v. *C. M. & P. S. Ry. Co.*, 49 Mont. 524; 143 Pac. 955.
Rustad v. *Great Northern Ry. Co.*, 122 Minn. 453; 142 N. W. 727.
Mark Owen & Co. v. *Michigan Central R. R. Co.*, 291 Ill. 149; 125 N. E. 767.
Mark Owen & Co. v. *Michigan Central R. R. Co.*, 214 Ill. App. 94.

II.

The allowance of forty-eight hours for the removal of the goods by Sections 1 and 5 of the Bill of Lading was only a recognition of the allowance of a reasonable time to unload, theretofore given the consignee.

Before the approval of the form of the Bill of Lading in the present case, by the Interstate Commerce Commission, the consignee had a right recognized by the courts to a reasonable time after placement and notice in which to unload, during which the liability of the carrier continued that of a common carrier.

J. J. Jackson & Sons v. *New York Central R. R. Co.*, 167 Ill. App. 461.

Schumacher v. *C. & N. W. Ry. Co.*, 207 Ill. 199; 69 N. E. 825.

Hutchinson on Carriers, 3d Ed., Secs. 707, 713.

That this doctrine is a reasonable one is further evidenced by the holding in a majority of the states that a consignee has a reasonable time to remove the goods even after they are actually warehoused.

Moses v. *Boston, etc. R. Co.*, 32 N. H. 523; 64 Am. D. 381.

Porter v. *Rock Island R. R. Co.*, 20 Ill. 407.

Bowdon v. *Atlantic Coast Line R. R. Co.*, 148 Ala. 29; 41 So. 294.

Missouri, etc. R. Co. v. *Pullen*, 90 Ark. 182; 118 S. W. 702.

Lewis v. *Louisville, etc. R. Co.*, 135 Ky. 361; 122 S. W. 184.

Sleade v. *Payne*, 14 La. Ann. 453.

United Fruit Co. v. *New York, etc. Transport Co.*, 104 Md. 567; 65 Atl. 415.

Walters v. *Detroit United R. Co.*, 139 Mich. 303; 102 N. W. 745.
Yazoo, etc. R. Co. v. *Blum*, 102 Miss. 303; 59 So. 92.
Scott Milling Co. v. *St. Louis, etc. R. Co.*, 127 Mo. App. 80; 104 S. W. 924.
Faulkner v. *Hart*, 82 N. Y. 413; 37 Am. R. 574.
Burr v. *Adams Express Co.*, 71 N. J. L. 263; 58 Atl. 609.
Poythress v. *Durham, etc. R. Co.*, 148 N. C. 391; 62 S. E. 515.
Lake Erie, etc. R. Co. v. *Hatch*, 52 Ohio St. 408; 39 N. E. 1042.
Bristow v. *Atlantic Coast L. R. Co.*, 72 S. C. 43; 51 S. E. 529.
Ouimit v. *Henshaw*, 35 Vt. 605; 84 Am. D. 646.
Wood v. *Crocker*, 18 Wis. 345.
Backhaus v. *Chgo. & N. W. Ry. Co.*, 92 Wis. 393; 66 N. W. 400.

That forty-eight hours was a reasonable time in which to unload, was recognized by the petitioner railroad in its rules in force at the time the shipment in question was made.

RULE 2—FREE TIME ALLOWED.

(*a*) Forty-eight hours (two days) free time will be allowed for unloading or loading on all commodities. (Trans., 13.)

ARGUMENT.

I.

Under sections one and five of the bill of lading covering the shipment in car No. 22049 the liability of the petitioner continued for a forty-eight hour period after placement and notice thereof to the respondent.

If placement and notice terminated the petitioner's liability as a common carrier, as contended by the petitioner herein, then why was it necessary for it to contract with the respondent that its liability as a common carrier should not "extend *beyond* a period of forty-eight hours after placement and notice?" (Trans., 15.) Not only are the provisions of the bill of lading cited herein an admission that petitioner's liability as a common carrier continued for forty-eight hours after placement and notice, but by its wording petitioner expressly stipulates that it shall so continue. No other reasonable construction seems possible. If the various constructions contended for by the petitioner are intended, then it failed to insert in the contract many important modifications of a very clearly expressed liability. Certainly the respondent who did not prepare the instrument should not be held to the modifications read into these provisions by the petitioner who did prepare it.

The Bill of Lading having been prepared by the petitioner, Sections 1 and 5 should be construed most strongly against it. The rule by which bills of lading must be interpreted is stated as follows:

Mr. Justice Peckham, in *Texas and Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621, on p. 626, said:

> "The bill of lading itself is an elaborate document, bearing on its face evidences of care and deliberation in the formation of the conditions of the liability of the companies issuing it. The language is chosen by the companies for the purpose, among others, of limiting and diminishing their common law liability, and if there be any doubt arising from the language used as to its proper meaning or construction, the words should be construed most strongly against the companies, because their officers or agents prepared the instrument, and as the court is to interpret such language, it is, as stated by Mr. Justice Harlan, in *Kansas City Bank* v. *Hartford Ins. Co.*, 95 U. S. 673, 79, both reasonable and just that its own words should be construed most strongly against itself. * * *"

To the same effect, see:

Lehigh Valley Transportation Co. v. *Post Sugar Co.*, 128 Ill. App. 600.

10 Corpus Juris, 181.

As stated by petitioner there are but four courts that have construed these sections of the bill of lading other than the Supreme and Appellate Courts of Illinois, both of the latter courts sustaining the contention of the respondent herein. Of the four decisions referred to, two are cited by the petitioner as sustaining its construction, while two of these four sustain the construction of the respondent.

In *McEntire* v. *Chicago, etc. Ry. Co.*, 98 Neb. 92; 152 N. W. 305, the pertinent point of the decision lay in the fact that the consignee locked the door of the car and retained the key. In this connection it was said on p. 307:

> " * * * and the consignee, by breaking the seal and locking the door with its own lock, and retaining the key, assumed control and dominion, and the transfer and delivery was complete."

In *Southern R. Co.* v. *Barclay*, 56 So. 26, the effect of the locking of a car door by the consignee as in the *McEntire case* is pointed out by the Court, p. 27:

> "If, thereafter, any one for the carrier had desired to protect the contents from the damage from rain to which they were exposed by reason of the leaky condition of the roof of the car, entrance to the car would have been prevented by the precaution taken by the consignee to maintain his own control of the situation."

In the present case, of course, the respondent did not lock the car door and the petitioner had every opportunity to protect the shipment from loss.

The case of *G. T. & W. R. Co.* v. *Glinski*, (Ind. App.); 125 N. E. 53, cited by the petitioner, there was a conflict in the evidence between the testimony of the consignee and that of the agent of the carrier as to what happened after placement and notice. The Court held that the question of delivery should have been submitted to the jury and if there had been a delivery the carrier would not have been liable as such during the 48-hour period. No reasons are given and no discussion is made by the Court as to the effect of the wording of Sections 1 and 5 of the Bill of Lading. No consideration is given to the use of the word "removed" in Section 5 instead of "delivered."

In *Gary Bros., etc.* v. *C. M. & P. S. Ry. Co.*, 49 Mont. 524; 143 Pac. 955, these same provisions of the standard bill of lading came before the Court for construction, the case involving the same questions as the present case. In this case a shipment of potatoes arrived at Butte on the morning of October 26th and was placed upon the team track customarily used. Notice of arrival was sent the consignee at noon, and in the afternoon he inspected the cars. That night, and before the consignee had unloaded the cars, the potatoes were frozen. The

railroad was held liable as a common carrier, despite the fact that by a state statute in Montana the liability of the carrier became changed to that of a warehouseman upon giving notice to the consignee. These same provisions of the bill of lading as in the present case were held to be a part of the contract of shipment and to waive the provisions of the statute. The Court held on p. 957:

> "In other words the contract itself not only fixes the liability of the carrier, but defines the character of delivery which will suffice to avoid it. Confessedly, the proof shows no such delivery on October 26th. Whatever, in the absence of the contract, might have been the effect of the circumstances disclosed by the evidence, there was no removal of the potatoes before they were frozen. The appellant (carrier) having undertaken to answer for their safety under its liability as carrier until they were removed within forty-eight hours, cannot now invoke the aid of any other rule."

To the same effect is the decision of the Court in *Rustad* v. *Great Northern Ry. Co.*, 122 Minn. 453; 142 N. W. 727.

The contention of the petitioner as to delivery in this case is without value, in view of the words used in Section 5 of the bill of lading. This was pointed out by the Appellate Court of Illinois in this case, *Mark Owen & Co.* v. *Michigan Central R. R. Co.*, 214 Ill. App. 94, wherein the Court said, p. 98:

> "Section 5 by its terms is limited to 'Property not removed.' The use of the word 'removed' instead of the word 'delivered,' in view of the previous hopeless conflict in the authorities as to what facts would or would not constitute delivery, was evidently not accidental. We think the plain meaning of the contract is that the common law liability of the carrier continues for forty-eight hours after placement and notice with respect to such part of the shipment as has not been removed."

On appeal this was again emphasized by the Supreme Court of Illinois in *Mark Owen & Co.* v. *Michigan Central R. R. Co.*, 291 Ill. 149; 125 N. E. 767, where on p. 768 it said:

> "Section 5 says as to property 'not removed' within forty-eight hours after notice—not property 'not delivered' within that time—may be kept in car, depot or place of delivery of the carrier, subject to a reasonable charge for storage and the carrier's liability as warehouseman, only, or, at the option of the carrier, it may be stored in a warehouse at the cost and risk of the owner, without liability on the part of the carrier, subject to a lien for freight and storage charges."

In *Gary Bros., etc.* v. *C. M. & P. S. Ry. Co.*, 49 Mont. 524; 143 Pac. 955, in which the same provisions of the Bill of Lading were construed, the Court said, p. 957:

> "In other words the contract itself not only fixes the liability of the carrier, but defines the character of delivery which will suffice to avoid it."

Authorities cited by petitioner on its liability as warehouseman.

The petitioner, notwithstanding, cites and quotes from a list of cases to support its contention of a complete delivery and consequent freedom from liability as a common carrier. In none of these decisions, of course, is there considered the effect of Sections 1 and 5 of the Bill of Lading. An analysis of these cases, moreover, shows the following:

In *Barclay* v. *Southern R. Co.*, 6 Ala. App. 502; 60 So. 479, the Court gives the following reasons why the carrier was relieved from further liability as a common carrier:

> "The consignee had accepted the goods, and they

were in his sole custody under lock and key, and the defendant did not even have access to them, and was not afforded the opportunity to protect them from the injury complained of, had it undertaken to do so."

Southern Ry. Co. v. *Barclay*, 1 Ala. App. 348; 56 So. 26—the same facts and reasons as in *Barclay* v. *Southern Ry. Co.* above.

Vaughan v. *N. Y., etc. R. Co.*, 27 R. I. 235; 61 Atl. 695. The consignee locked the car door; also the Court held the carrier not liable either as carrier or warehouseman since the cars had been placed on the spur track of the consignee and not on a public delivery team track.

Texas, etc., R. Co. v. *Robertson* (Tex.); 143 S. W. 708—The consignee sealed the car up on his own account and entered into an agreement with the railroad company to use the car as a warehouse and to pay demurrage for the same.

Denver & R. G. R. Co. v. *Johnson* (Colo.); 193 Pac. 729—The consignee locked the car door with his own lock.

Rothschild v. *N. P. R. Co.*, 68 Wash. 527; 123 Pac. 1011. In this case a carload of spirits arrived in a dangerous condition, and consignee with full knowledge of this condition and of the hazard accepted the car, and when he opened the door and proceeded to unload, the car burst into flames and was destroyed. The Court held under the facts that whether the railroad defendant was liable as a carrier or as a warehouseman was an "immaterial question" but when the consignee "consented to receive it after being made aware of the unsafe condition, it waived its rights to insist upon a delivery in proper condition, and took upon itself the risk of loss of the property arising from the act of removing it in its unsafe condition."

Chicago, etc. R. Co. v. *Kelm*, 121 Minn. 343; 141 N. W. 295. Two carloads of hay transported by defendant carrier were ordered by the consignee to be turned over to the Northern Pacific to be carried by the latter to its industrial track adjacent to consignee's warehouse. The Court held the defendant's liability terminated when it had complied with consignee's request and delivered the cars to the Northern Pacific. The defendant carrier could not protect the car after delivery on the industrial track without becoming a trespasser, and certainly should not be held under the facts.

Gratiot St. Warehouse Co. v. *St. L., etc. R. Co.*, 221 Ill. 418; 77 N. E. 675. This was an action to recover damages on account of deterioration in eleven cars of corn, which stood for three weeks during the hot weather in cars on the sidetrack, after arrival at destination. Notice of arrival had been sent within twenty-four hours, and on inspection by the person to whom notice was sent the contents of the cars were found in good condition. The damage was caused, of course, by the long exposure to the hot weather. This decision we believe is correct, since the consignee failed to remove the contents of the cars within a reasonable time after notice, and the railroad's responsibility as a carrier had terminated. This is in accord with the respondent's contention in the case at bar.

In the following cases there was no controversy as to loss or damage to property, and with one exception, no controversy between the carrier and consignee.

The questions involved were as follows:

Lewis v. *N. Y. O. & W. Ry. Co.*, 210 N. Y. 21; 104 N. E. 944.—Whether the carrier was liable for negligent loading by the consignor whereby an employe of the consignee was injured by a bale of hay falling on him when the car door was opened, was the question here decided.

Levers v. *A. T. & S. F. Ry. Co.*, 22 N. M. 599; 166 Pac. 1178.—A suit by the consignor against the carrier in which the question of delivery became material.

State v. *Intoxicating Liquors*, 106 Me. 138; 76 Atl. 265.—Whether the character of a shipment of liquor as an interstate shipment had ended so that it could be seized by the local authorities.

Anchor Mill Co. v. *B. C. R. & N. R. Co.*, 102 Ia. 262; 71 N. W. 255.—Whether the holder of a bill of lading or the consignee was entitled to possession of certain wheat.

Anthony et al v. *N. Y. C. & H. R. R. Co.*, 223 N. Y. 21; 119 N. E. 90.—Whether carrier after placing car on public team track and after part was unloaded was obliged to transport to lines of another carrier at the request of the consignee, where there was no tariff for the transportation.

Brooks Mfg. Co. v. *Southern R. Co.*, 152 N. C. 665; 68 S. E. 243.—A suit to recover a statutory penalty for delay.

In *Kenny Company* v. *A. & W. P. R. Co.*, 122 Ga. 365; 50 S. E. 132.—The loss complained of occurred over forty-eight hours after placement and notice, but there was no consideration of any provisions of a Bill of Lading such as are involved in the present case. The Court apparently allowed no time to the consignee to unload.

P. C. & St. L. R. Co. v. *Nash*, 43 Ind. 423. Taking the quotation of the petitioner in its brief, p. 25, at its face value, it would not be applicable to the facts of the present case, since the goods here involved could be warehoused and by the rules of the petitioner in force at the time of these shipments it was obliged to unload at the car door. (Trans., 15.)

Whitney Co. v. *R. & D. R. Co.*, 38 S. C. 365; 17 S. E. 147. In this case the cars were delivered to the "Whitney

switch" which was in reality the private switch track of the consignee and by agreement between consignee and carrier the latter was not to guard the cars.

We do not agree with the contention of the petitioner that under the construction of the Supreme Court of Illinois "a carrier would be liable as such for loss or damage to a carload shipment on a private track of a consignee on his property and under his exclusive control." In such a case the carrier would not be held, since it could not enter on the private property of the consignee to police and protect either the car or its contents. A carrier should not be held to the responsibility of protecting a consignee's goods from fire or theft, when to do so, it would have to constitute itself a trespasser.

In this connection we believe the Court can take judicial notice that in the City of Chicago the public delivery team tracks are a part of the great yard system of a railroad and under its control and care. Anyone who enters upon this property without the permission of the railroad is a trespasser. On the other hand, the railroad can protect the car and its contents from theft and fire and can employ watchmen in sufficient force to thoroughly police these team tracks. If the theory of the petitioner, that its liability as a common carrier terminates after placement on one of its public delivery team tracks and notice to consignee, is correct, then it would be incumbent upon every consignee in the City of Chicago upon receiving notice, to hasten to the yards of the railroad and guard his cars until the unloading could be completed, whether the time be day or night, and in so doing he would make himself liable for trespassing on the railroad property. The unreasonableness of such a rule is apparent, and certainly such a system would be impracticable.

II.

The allowance of forty-eight hours for the removal of the goods by Sections 1 and 5 of the Bill of Lading was only a recognition of the allowance of a reasonable time to unload, theretofore given the consignee.

Before the approval of the form of the Bill of Lading in the present case by the Interstate Commerce Commission, the consignee had a right recognized by the Courts, to a reasonable time after placement and notice in which to unload, during which the liability of the carrier continued that of a common carrier.

In *J. J. Jackson & Sons* v. *New York Central R. R. Co.*, 167 Ill. App. 461, the Court said:

> "The defendants in error were not bound to deliver the apples to the consignee at its place of business in the absence of a contract or custom to do so; but they were bound to notify the consignee of the arrival of the apples and to place them on their tracks or other proper place where the consignee could take them. Until they did so their stringent liability as common carriers continued. The consignee upon such notice and delivery was bound to remove the apples within a reasonable time. *From the time that the consignee had notice of the arrival of the apples and a reasonable time had elapsed for their removal,* they were at the risk of the plaintiffs in error * * *."

In *Schumacher* v. *C. & N. W. Ry. Co.*, 207 Ill. 199; 69 N. E. 825, the Court again recognized this right when it said, on p. 827:

> "Railroads, as to freights committed to their charge, during the period of transport and until they are delivered, bear two well recognized relations. While in transit, and for a reasonable time after reaching the point of destination, they owe the duties and bear the relation of common carriers; and when

> the car containing the freight is delivered to the consignee upon his own track or at the place selected by him for unloading, if he have one, or to the consignee upon the company's usual and customary track for the discharge of freight, *with reasonable and proper opportunity to the consignee to take the same*, or when placed in the warehouse of such company or the warehouse of another selected by them, in any and all such cases such companies then bear to such freight the relation of warehousemen."

See also Hutchinson on Carriers, 3rd Ed., Sec. 707, 8, 11.

That this doctrine is a reasonable one is further evidenced by the holding in a majority of the states that a consignee has a reasonable time to remove the goods even after they are actually warehoused.

In *Moses* v. *Boston, etc., R. Co.*, 32 N. H. 523; 64 Am. D. 381, the leading case for this doctrine, the Court says:

> "If purloined, destroyed, or damaged by their fraud or neglect, subsequently to their removal and before he can have had the opportunity to come for them, he is left to precisely the same proof as if the larceny or injury had occurred while they were actually *in transitu*—the declarations of the servants of the company—they having, it may well be supposed, feelings and interests adverse to him, and knowing that he has no evidence at command from other sources to impeach their statement. It is obvious, too, that the opportunities and facilities for embezzling the goods and for other fraudulent or collusive practices must continue to be equally tempting after their removal under such circumstances as before."

In *Porter* v. *Rock Island R. R. Co.*, 20 Ill. 407, the Court said on page 410:

> "To hold that they were thus relieved from the liability of carriers, would be to leave the owner to contend with the same difficulties in showing theft,

embezzlement, or loss by negligence by the carriers, their agents and servants, that he would have had at any time after they were first placed upon the road."

To the same effect is:

Bowdon v. *Atlantic Coast Line R. R. Co.*, 148 Ala. 29; 41 So. 294.

Missouri, etc. R. Co. v. *Pullen*, 90 Ark. 182; 118 S. W. 702.

Lewis v. *Louisville, etc. R. Co.*, 135 Ky. 361; 122 S. W. 184.

Sleade v. *Payne*, 14 La. Ann. 453.

United Fruit Co. v. *New York, etc. Transport Co.*, 104 Md. 567; 65 Atl. 415.

Walters v. *Detroit United R. Co.*, 139 Mich. 303; 102 N. W. 745.

Yazoo, etc. R. Co. v. *Blum*, 102 Miss. 303; 59 So. 92.

Scott Milling Co. v. *St. Louis, etc. R. Co.*, 127 Mo. App. 80; 104 S. W. 924.

Faulkner v. *Hart*, 82 N. Y. 413; 37 Am. R. 574.

Burr v. *Adams Express Co.*, 71 N. J. L. 263; 58 Atl. 609.

Poythress v. *Durham, etc. R. Co.*, 148 N. C. 391; 62 S. E. 515.

Lake Erie, etc. R. Co. v. *Hatch*, 52 Ohio St. 408; 39 N. E. 1042.

Bristow v. *Atlantic Coast L. R. Co.*, 72 S. C. 43; 51 S. E. 529.

Ouimit v. *Henshaw*, 35 Vt. 605; 84 Am. D. 646.

Wood v. *Crocker*, 18 Wis. 345.

Bachus v. *Chgo. & N. W. Ry. Co.*, 92 Wis. 393; 66 N. W. 400.

That forty-eight hours was a reasonable time in which to unload was recognized by the petitioner railroad in its rules in force at the time the shipment in question was made.

RULE 2. FREE TIME ALLOWED.

(a) Forty-eight hours (two days) free time will be allowed for unloading or loading on all commodities. (Trans., 13.)

In the decision appealed from in the present case the Supreme Court of Illinois said:

> "* * * it is not disputed that forty-eight hours was a reasonable time for appellee to unload the cars."

CONCLUSION.

The provisions of Sections 1 and 5 of the Bill of Lading are perfectly plain. If there were any real or supposed hardships imposed by them on the petitioner or the other railroads, adequate conditions and limitations would have been inserted in the wording of the bill of lading, or the railroads would long ago have sought to have these provisions modified as petitioner would have them construed. The respondent did all that was required of it and removed its goods within the forty-eight hour period. It suffered a loss during this period, and for that loss petitioner is liable for $8.68.

We, therefore, contend that the decision of the Supreme Court of Illinois as to car No. 22049 be affirmed.

Respectfully submitted,

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